

The stipulations are herein adopted by the Appeals Board as specifically set forth in the awards of the administrative law judge dated November 4, 1991, and January 12, 1994.

ISSUES

The original award in this case was entered by Administrative Law Judge Thomas F. Richardson on November 4, 1991. Thereafter, a request for a director's review was filed and Administrative Law Judge Richardson's award was affirmed in all respects by the Director on February 26, 1992. The Director's Order was then appealed to the District Court of Finney County, Kansas who on June 24, 1992, remanded the case to Administrative Law Judge Richardson for further findings and conclusions of law consistent with the current state of the law. The original award of the administrative law judge was based on K.S.A. 1991 Supp. 44-510d(a)(23) which provided that bilateral repetitive use conditions occurring in the opposite upper extremities, shall be computed as separate scheduled injuries to each extremity and the lost of use of each extremity shall be increased by twenty percent (20%). Following the Director's Order and prior to the decision of the District Court, K.S.A. 1991 Supp. 44-510d(a)(23) was declared unconstitutional by the Kansas Supreme Court in the case of Stevenson v. Sugar Creek Packing, 250 Kan. 768, 830 P.2d 41 (1992).

Administrative Law Judge Thomas F. Richardson subsequently entered an award in this case dated January 12, 1994, incorporating the November 4, 1991, findings which are not inconsistent with the January 12, 1994, decision.

The issues presented by oral argument for decision by the Appeals Board are:

- (1) What is the nature and extent of claimant's disability?
- (2) Whether claimant is entitled to future medical and vocational rehabilitation benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) As a result of a personal injury by accident which arose out of and in the course of claimant's employment with the respondent, Monfort, Inc., the claimant, Juana Villareal, has sustained a seventeen percent (17%) permanent partial general functional disability.

On the date of the regular hearing in this case, May 21, 1991, the claimant was 24 years of age and the mother of four children. She was originally from the country of Mexico having arrived in the United States in June of 1987, where she first was employed by Excel Meat Packing Company in Dodge City, Kansas. Her education was terminated in Mexico during the 8th grade. Since the 8th grade, she has received no further training or education in the development of any special job skills.

The claimant started working for the respondent on February 26, 1988. Her job classification on June 8, 1989, the stipulated date of her accidental injury, was that of a trim picker. The job of a trim picker is in the fabrication processing portion of the meat packing

plant which requires the worker to stand at a conveyor belt and transfer salvageable pieces of meat from one conveyor belt to another. This is a light job as the worker is only required to lift up to five pounds. However, the worker is required to do repetitive work with both hands during the complete work shift.

In June of 1989, the claimant began experiencing pain and discomfort in her left fingers and left wrist area. The pain started slowly and gradually worsened moving up her arm into her shoulder. Eventually she also noticed pain and discomfort in her right arm and shoulder. After she notified the respondent of her pain, she was sent to Terry Hunsberger, D.O., in Garden City, Kansas, for treatment.

Dr. Hunsberger, first saw the claimant on July 7, 1989, with complaints of pain and discomfort in her left wrist which she had noticed for some two or three weeks. He provided conservative treatment for the claimant in the form of anti-inflammatory medicine, physical therapy, pulsatrem electrical stimulation and wrist injections. She was returned to work with restrictions to not use her left hand. Finally, claimant was referred by Dr. Hunsberger to see C. Reiff Brown, M.D., a board certified orthopedic surgeon, in Great Bend, Kansas, because the claimant was not responding to the conservative treatment. However, the claimant did return to Dr. Hunsberger for treatment in September of 1990, complaining of discomfort in both hands, arms and shoulder areas. Claimant also returned on October 22, 1990, but has not sought treatment since that time.

Dr. Brown first treated the claimant on September 19, 1989, with the initial complaint in the left arm and later in the right arm. Symptoms had come on gradually in the course of her work activities. She was continuing working with severe pain at this time. Dr. Brown found tenderness over the extensor tendon of left thumb, pain in the joints of left arm and discomfort in both shoulders. His diagnosis was extensor tendinitis left thumb and bilateral carpal tunnel syndrome. Surgery was performed by Dr. Brown on January 12, 1990, consisting of incision of the extensor tendon sheath of the left thumb and left carpal tunnel decompression. The claimant's right carpal tunnel syndrome was treated conservatively and surgery was not performed. Physical therapy was prescribed and Dr. Brown released the claimant to return to work on May 18, 1990, with temporary restrictions of no lifting above five pounds and no repeated use of her hands. The claimant returned on June 29, 1990, at which time Dr. Brown opined that the claimant had reached maximum medical improvement and she needed to reduce her activities with her hands in order to control her symptoms. Permanent restrictions were placed on the claimant to avoid repeated use of her hands and wrists in flexion and extension and to avoid lifting above five to ten pounds. In response to a question in reference to future medical treatment, Dr. Brown indicated that this would not be required unless the claimant would continue to use her hands doing repeated activities which would increase her symptoms and require treatment.

Concerning permanent impairment of function, Dr. Brown concluded, based on his years of experience, that claimant had a permanent partial impairment of the left arm of fifteen percent (15%) and also fifteen percent (15%) of the right arm. The permanent impairment rating was the result of residual effects of the carpal tunnel syndrome and tendinitis of both the left and right arms. According to Dr. Brown, the AMA Guides generally do not recognize carpal tunnel and tendinitis problems and cannot be used for these conditions. Dr. Brown went on to testify that he did not find any evidence of permanent functional impairment to the claimant's shoulders as a result of her complaints. Claimant was found to be susceptible to tendon inflammation from overuse. However, her shoulder complaints were never severe enough to require treatment.

At the request of claimant's attorney, she was examined and evaluated by two Kansas City, Missouri physicians, James P. Hopkins, M.D., and Edward J. Prostic, M.D. Dr. Hopkins, board certified by the American Society of Plastic and Reconstruction Surgeons and the American College of Surgeons, examined the claimant on August 28, 1990, concerning the injuries she received while working for the respondent. Dr. Hopkins had the benefit of the records from claimant's previous medical treatment. Dr. Hopkins took a history from the claimant and conducted a physical examination. Dr. Hopkins found post carpal tunnel syndrome on the left upper extremity, continued discomfort in the back, upper left thumb, first dorsal compartment on left as well as on right upper extremity. Claimant had some chronic tenosynovitis of the radial carpal joint of both wrists and also tendinitis into the upper forearm compartments bilaterally. Dr. Hopkins used the AMA Guides, Third Edition, Supplement, in arriving at his ratings for permanent disability concerning carpal tunnel syndrome and the median nerve. Dr. Hopkins assigned a thirty five percent (35%) permanent partial disability to the claimant's left upper extremity and twenty five percent (25%) permanent partial disability to the claimant's right upper extremity. In addition, Dr. Hopkins added a fifteen percent (15%) loading factor to each rating. It is Dr. Hopkins opinion that because both extremities are involved there is an added impairment that should be considered. Dr. Hopkins is in agreement with restrictions that require the claimant not to do any significant lifting in excess of five to twelve pounds and also no repetitive use of the arms.

Dr. Prostic, a board certified orthopedic surgeon, examined the claimant on February 18, 1991. He took a history from the claimant and also had an opportunity to review medical records concerning previous medical treatment she had received for her work connected injury. After Dr. Prostic completed a physical examination of the claimant, his diagnosis was carpal tunnel syndrome with the residual symptoms; flexor tendinitis of both hands; tendinitis of the elbow and scapulocostal syndrome which is a condition in which there is tenderness and spasm of the muscles about the shoulder blade. With respect to functional disability, Dr. Prostic rated the claimant as having a fifteen percent (15%) permanent partial impairment of the body as a whole on a functional basis. Seven and one-half percent (7½%) of the fifteen percent (15%) impairment rating is applicable to the claimant's neck and shoulder area and the other seven and one-half percent (7½%) is applicable to claimant's upper extremities. Dr. Prostic's ratings were not based on the AMA Guides because most of the conditions that the claimant has are not discussed in the AMA Guides. Dr. Prostic opined that the claimant should have permanent restriction against repeated forceful use of the either hand and against work that requires her to perform at an uncomfortable speed such as one frequently finds in factory type employment. He went on to opine that she would need future medical treatment.

The claimant continues to work as trim picker for the respondent at comparable wage even though the job requires her to use her hands repetitively. She continues to have pain and discomfort in both her left and right arms and shoulders. It is her opinion and testimony that if she had to leave the employment of the respondent, she would not be able to find other employment at a wage comparable to that paid by the respondent. It is her further request that future medical treatment be provided and that vocational rehabilitation benefits be provided if needed.

In his award dated November 4, 1991, Administrative Law Judge Richardson awarded a seven and one-half percent (7½%) permanent partial general disability based on the functional rating of Dr. Prostic. The administrative law judge used Dr. Prostic's functional rating because Dr. Prostic separated out the claimant's shoulder problems from

her total functional impairment of fifteen percent (15%). He rejected claimant's argument that the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e(a) had been overcome by evidence presented by the claimant.

As previously set forth, this case was originally decided pursuant to K.S.A. 1988 Supp. 44-510d(a)(23) which provides that compensation for repetitive use conditions occurring in opposite upper extremities shall be computed as separate scheduled injuries. The Kansas Supreme Court in the case of Stevenson v. Sugar Creek Packing, 250 Kan. 768, 830 P.2d 41 (1992), held such statute unconstitutional. Accordingly, the case at hand is to be decided pursuant to K.S.A. 1988 Supp. 44-510e, which provides for permanent partial disability of the whole body based on functional or work disability. The Appellate Courts have allowed a worker to be compensated for permanent partial disability to the body as a whole under K.S.A. 44-510e rather than under K.S.A. 44-510d when both hands, arms, feet, legs, or eyes were injured. Murphy v. IBP, Inc., 240 Kan. 141, 145, 727 P.2d 468 (1986); Downes v. IBP, Inc., 10 Kan. App. 2d 39, 40, 691 P.2d 42 (1984), rev. denied 236 Kan. 875 (1985).

In regard to the question of permanent partial disability, the first issue that has to be decided is whether or not the claimant has presented evidence that will overcome the rebuttable presumption of no work disability when an employee returns to work at a comparable wage contained in K.S.A. 1988 Supp. 44-510e(a). Both the claimant and Ed Martinez, acting plant personnel manager, testified that after the claimant's injury to both of her upper extremities, she returned in May of 1990, to her regular job as a trim picker after medical treatment was provided by the respondent. As of the date of the regular hearing, claimant was performing these job duties at a comparable wage. She did testify that she continues to be symptomatic with pain and discomfort in her hands, wrists, arms, and shoulders. Even after this testimony, she went on to state that she intends to remain employed by the respondent. Additionally, the respondent has a company policy to continue to afford injured workers employment whenever possible. The question of whether the presumption of no work disability has been overcome by the evidence is a question of fact. See Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738 (1993). In the instant case, claimant has returned to her regular job which is not temporary as the evidence indicates that it has a continuing future. The respondent also has a continuing policy of returning injured employees to work. Even though the claimant continues to have pain and discomfort, she plans on remaining employed with the respondent. The Appeals Board finds that the evidence the claimant has presented in this case has failed to overcome the presumption of no work disability. Therefore, the Appeals Board will not address the issue of work disability.

Since the presumption of no work disability has not been overcome, the claimant is only entitled to an award based on functional impairment. Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991). Claimant argues that the only credible medical evidence presented is Dr. Hopkins's testimony because he used the AMA Guides to determine his impairment ratings. The Appeals Board finds that Dr. Hopkins's ratings of thirty-five percent (35%) to the left upper extremity and twenty-five percent (25%) to the right upper extremity, plus a fifteen percent (15%) load factor are too extreme when compared to the ratings of the other doctors and are not persuasive. The Appeals Board agrees with Administrative Law Judge Richardson's findings that claimant has not proved by credible evidence that her shoulder complaints are sufficient to produce a permanent disability. Therefore, in regard to the claimant's permanent functional impairment, the Appeals Board finds that the opinion of the treating physician, C. Reiff Brown, M.D., is the

most persuasive evidence presented that does not take into consideration these shoulder complaints. Administrative Law Judge Richardson adopted Dr. Brown's opinion that the claimant had suffered a fifteen percent (15%) permanent functional impairment to each forearm in his Order dated November 4, 1991. The Appeals Board also finds that Dr. Brown's impairment of function ratings are the most persuasive and converts the fifteen percent (15%) ratings of each forearm to a seventeen percent (17%) functional impairment to the body as a whole. Utilizing the AMA Guides, Third Edition, Revised, Table 3, Relationship of Impairment of the Upper Extremity to Impairment of the Whole Person, at page 16, the fifteen percent (15%) upper extremity impairment converts to a nine percent (9%) whole person. Combining the nine percent (9%) impairment rating of each upper extremity, utilizing the Combined Values Chart found at page 254, results in the seventeen percent (17%) functional impairment of the whole body.

(2) The claimant is entitled to future medical treatment and vocational rehabilitation benefits upon proper application to and approval by the Director of Workers Compensation.

The claimant has testified that even though she has returned to her regular job with the respondent at a comparable wage, she continues to have pain and discomfort in both of her hands, wrists, and arms. Dr. Brown testified that if the claimant would continue to use her hands doing repeated activities, this would increase her symptoms and require future medical treatment. Dr. Prostic also indicated that the claimant's injuries could require future medical treatment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson, dated January 12, 1994, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Juana Villareal, and against the respondent, Monfort, Inc., and its insurance carrier, City Insurance Company, for an accidental injury occurring on June 8, 1989.

The claimant is entitled to 28.57 weeks of temporary total disability at the rate of \$197.13 per week or \$5,632.00 followed by 386.43 weeks at \$33.51 per week or \$12,949.27 for a seventeen percent (17%) permanent partial general body functional disability, making a total sum of \$18,581.27.

As of May 19, 1994, there would be due and owing to the claimant 28.57 weeks of temporary total disability compensation at \$197.13 per week in the sum of \$5,632.00 plus 229.57 weeks of permanent partial disability compensation at the rate of \$33.51 per week in the sum of \$7,692.89 for a total due and owing of \$13,324.89 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$5,256.38 shall be paid at \$33.51 per week for 156.86 weeks or until further order of the Director of the Division of Workers Compensation.

The claimant is entitled to unauthorized medical up to the statutory maximum of \$350.00 upon proper presentation of expenses.

Future medical benefits and vocational rehabilitation benefits will be ordered only upon proper application to and approval by the Director of the Division of Workers Compensation.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

The fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed against the respondent and insurance carrier to be paid direct as follows:

UNDERWOOD & SHANE	
Transcript of Proceedings	\$ 158.40
Deposition of C. Reiff Brown, M.D.	\$ 424.00
BEVERLY LOHREY	
Deposition of Ed Martinez	Unknown
Deposition of Terry Hunsberger, D.O.	Unknown
THERESA M. TAYLOR	
Deposition of Edward J. Prostic, M.D.	Unknown
Deposition of James P. Hopkins, M.D.	\$ 270.30
SHARON A. RIEKER	
Deposition of Michael J. Dreiling	\$ 296.50

IT IS SO ORDERED.

Dated this ____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I disagree with the majority opinion of the Appeals Board and would find that the presumption of no work disability found in K.S.A. 1988 Supp. 44-510e is not applicable as the respondent has failed to provide claimant a job within her permanent restrictions and limitations. Claimant is entitled to an award for work disability based upon the facts and circumstances of this proceeding.

The uncontroverted evidence is that claimant injured both upper extremities as a result of the repetitive nature of her job as a "trim picker." Dr. Brown, the authorized treating physician, believes that claimant should be permanently restricted from using her hands in a repetitive manner. Likewise, Dr. Hopkins believes that claimant should avoid repetitive use of her arms. I interpret Dr. Prostic's opinion to be similar.

Despite claimant's restrictions against repetitive use of her hands, the respondent has returned claimant to the very job that caused the injury in the first instance and claimant is working outside her medical restrictions. There has been no accommodation. Claimant testified that she continues to work for respondent despite her symptomatology as she is the sole support of herself and her four children.

Based upon the medical information, I can only believe that claimant's return to work is temporary and she is destined to experience additional injury or increased symptomatology that will force her to leave work. In that event, hopefully claimant will request review and modification of this Award or initiate a new claim if the facts warrant.

I recognize this is a difficult issue and there may be reluctance to find work disability when someone has returned to work at comparable wage. Some may argue that the employer is being "punished" if work disability is granted and that there would be no incentive to retain an injured employee. However, we must give utmost consideration to

how the injury affects one's ability to work and earn wages within their restrictions and limitations. An award based upon work disability is not punishment, but the statutory right of the claimant when the facts warrant. Respondent is a large corporation and may choose to accommodate claimant within her restrictions or, in the alternative, provide vocational rehabilitation. This is a work disability case.

BOARD MEMBER

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Thomas F. Richardson, Administrative Law Judge
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